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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Nicholas Matthew Klein,

Plaintiff,

vs.

Joseph Arpaio,

Defendant.

No. CV 09-964-PHX-DGC (LOA)

ORDER

Plaintiff Nicholas Matthew Klein, who is confined in the Maricopa County Lower Buckeye Jail, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. #1) and an Application to Proceed *In Forma Pauperis* (Doc. #3). The Court will order Defendant Joseph Arpaio to answer Count I of the Complaint and will dismiss Count II for failure to state a claim upon which relief may be granted.

I. Application to Proceed *In Forma Pauperis* and Filing Fee

Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will assess an initial partial filing fee of \$6.50. The remainder of the fee will be collected monthly in payments of 20% of the previous month's income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government agency to collect and forward the fees according to the statutory formula.

1 **II. Statutory Screening of Prisoner Complaints**

2 The Court is required to screen complaints brought by prisoners seeking relief against
3 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
5 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
6 be granted, or that seek monetary relief from a defendant who is immune from such relief.
7 28 U.S.C. § 1915A(b)(1), (2).

8 **III. Complaint**

9 Named as Defendant in the Complaint is Joseph Arpaio, Maricopa County Sheriff.
10 In Count I, Plaintiff claims that his Fifth, Eighth, and Fourteenth Amendment rights are being
11 violated by Defendant Joseph Arpaio because he sets policy and instructs his staff to feed all
12 pre-trial detainees only two meals per day. Plaintiff alleges that the meals are lacking in
13 proper nutrition and consist of rotten and outdated meat, stale bread, and rotten fruit.
14 Plaintiff further alleges that Defendant allows detainees who have purchased “commissary”
15 to “ration,” but does not allow indigent detainees to ration or save food provided by the
16 County.

17 In Count II, Plaintiff claims that his Fifth, Eighth, and Fourteenth Amendment rights
18 were violated on February 12, 2009; March 31, 2009; April 28, 2009; and April 30, 2009,
19 when he was forced to wait to go to court with 20+ inmates in a holding cell that was only
20 established to hold 8-12 inmates. Plaintiff alleges that there was nowhere to sit besides a
21 germ-ridden, cockroach-infested floor. Plaintiff further alleges that the toilet in the cell was
22 not working and was overflowing and that there was no fresh drinking water available.
23 Plaintiff also alleges that the holding cell is located in the Madison Jail, which has been
24 condemned by authorities, and that in the evenings prior to being transferred to the holding
25 cell he was awakened at 11:00 PM, fed at 1:00 AM, and not fed again until the evening
26 hours.

27 Plaintiff seeks compensatory and punitive monetary damages and to hold Defendant
28 accountable for daily civil rights violations. Plaintiff further seeks an order for detainees to

1 be fed adequate portions of fresh food that are nutritionally balanced. Plaintiff also seeks an
2 order that all violations be corrected by independent federal monitors, including the posting
3 of maximum prisoner-per-cell signs at all facilities with holding cells and the extermination
4 of bugs.

5 **IV. Failure to State a Claim**

6 To state a viable constitutional claim under 42 U.S.C. § 1983, Plaintiff must show an
7 affirmative link between the alleged injury and the conduct of an individual Defendant.
8 Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976).

9 To state a claim against a state official, the civil rights complainant must allege that
10 the official personally participated in the constitutional deprivation, or that a state
11 supervisory official was aware of the widespread abuses and with deliberate indifference to
12 the inmate's constitutional rights failed to take action to prevent further misconduct. King
13 v. Atiyeh, 814 F.2d 565, 568 (9th Cir. 1987); see also Monell v. New York City Department
14 of Social Services, 436 U.S. 658, 691 (1978); Williams v. Cash, 836 F.2d 1318, 1320 (11th
15 Cir. 1988).

16 There is no liability under 42 U.S.C. § 1983 based on a theory of *respondeat superior*,
17 and, therefore, a defendant's position as the supervisor of persons who allegedly violated a
18 plaintiff's constitutional rights does not impose liability. Monell, 436 U.S. at 691; West v.
19 Atkins, 487 U.S. 42, 54 n.12 (1988); Ybarra v. Reno Thunderbird Mobile Home Village, 723
20 F.2d 675, 680-81 (9th Cir. 1984).

21 Although *pro se* pleadings are liberally construed, Haines v. Kerner, 404 U.S. 519
22 (1972), conclusory and vague allegations will not support a cause of action. Ivey v. Board
23 of Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982); Rhodes v.
24 Robinson, 612 F.2d 766, 772 (3d Cir. 1979). Further, a liberal interpretation of a civil rights
25 complaint may not supply essential elements of the claim that were not initially pled. Ivey,
26 673 F.2d at 268.

27 Although Plaintiff names Joseph Arpaio as a Defendant in the Complaint, he has not
28 described any specific conduct by Defendant Arpaio in Count II that violated Plaintiff's

1 constitutional rights and led to his injuries. Defendant Arpaio is not liable for violations of
2 Plaintiff's rights during incarceration simply because, as the Maricopa County Sheriff, he is
3 in charge of the county jails. Accordingly, Count II will be dismissed for failure to state a
4 claim upon which relief may be granted.

5 **V. Claims for Which an Answer Will be Required**

6 Liberally construed, Plaintiff's allegations in Count I state a claim and the Court will
7 require Defendant Arpaio to answer this claim.

8 **VI. Warnings**

9 **A. Release**

10 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
11 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay
12 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
13 in dismissal of this action.

14 **B. Address Changes**

15 Plaintiff must file and serve a notice of a change of address in accordance with Rule
16 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
17 relief with a notice of change of address. Failure to comply may result in dismissal of this
18 action.

19 **C. Copies**

20 Plaintiff must serve Defendant, or counsel if an appearance has been entered, a copy
21 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
22 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
23 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply
24 may result in the filing being stricken without further notice to Plaintiff.

25 **D. Possible Dismissal**

26 If Plaintiff fails to timely comply with every provision of this Order, including these
27 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
28 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to

1 comply with any order of the Court).

2 **IT IS ORDERED:**

3 (1) Plaintiff's Application to Proceed *In Forma Pauperis* (Doc. #3) is **granted**.

4 (2) As required by the accompanying Order to the appropriate government agency,
5 Plaintiff **must pay** the \$350.00 filing fee and is **assessed** an initial partial filing fee of \$6.50.

6 (3) Count II of the Complaint (Doc. #1) is **dismissed** without prejudice.

7 (4) Defendant Joseph Arpaio **must answer** Count I of the Complaint.

8 (5) The Clerk of Court **must send** Plaintiff a service packet including the
9 Complaint (Doc. #1), this Order, and both summons and request for waiver forms for
10 Defendant Arpaio.

11 (6) Plaintiff **must complete and return the service packet** to the Clerk of Court
12 within 20 days of the date of filing of this Order. The United States Marshal will not provide
13 service of process if Plaintiff fails to comply with this Order.

14 (7) **If** Plaintiff does not either obtain a waiver of service of the summons or
15 complete service of the Summons and Complaint on Defendant within 120 days of the filing
16 of the Complaint or within 60 days of the filing of this Order, whichever is later, the action
17 may be dismissed. Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(I).

18 (8) The United States Marshal **must retain** the Summons, a copy of the
19 Complaint, and a copy of this Order for future use.

20 (9) The United States Marshal **must notify** Defendant of the commencement of
21 this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal
22 Rules of Civil Procedure. The notice to Defendant must include a copy of this Order. The
23 Marshal must immediately file requests for waivers that were returned as undeliverable and
24 waivers of service of the summons. If a waiver of service of summons is not returned by
25 Defendant within 30 days from the date the request for waiver was sent by the Marshal, the
26 Marshal must:

27 (a) personally serve copies of the Summons, Complaint, and this Order upon
28 Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure; and

1 (b) within 10 days after personal service is effected, file the return of service
2 for Defendant, along with evidence of the attempt to secure a waiver of service of the
3 summons and of the costs subsequently incurred in effecting service upon Defendant.
4 The costs of service must be enumerated on the return of service form (USM-285) and
5 must include the costs incurred by the Marshal for photocopying additional copies of
6 the Summons, Complaint, or this Order and for preparing new process receipt and
7 return forms (USM-285), if required. Costs of service will be taxed against the
8 personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil
9 Procedure, unless otherwise ordered by the Court.

10 (10) **If Defendant agrees to waive service of the Summons and Complaint, he**
11 **must return the signed waiver forms to the United States Marshal, not the Plaintiff.**

12 (11) Defendant **must answer** Count I of the Complaint or otherwise respond by
13 appropriate motion within the time provided by the applicable provisions of Rule 12(a) of
14 the Federal Rules of Civil Procedure.

15 (12) This matter is **referred** to Magistrate Judge Lawrence O. Anderson pursuant
16 to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as
17 authorized under 28 U.S.C. § 636(b)(1).

18 DATED this 6th day of July, 2009.

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23 David G. Campbell
24 United States District Judge
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